National Retail Association

NT Discussion Paper

Reducing Red Tape for Retail Shop Leases

Review of the Business Tenancies (Fair Dealings) Act

Executive Summary

The National Retail Association (NRA) is a not-for-profit organisation that provides professional services and critical information and advice to retail, fast food and broader service industry throughout Australia.

The NRA is Australia's largest and most representative retail industry organisation, representing the majority of retail chains, as well as independent retailers, franchisees and other service sector employees. NRA represents over 19,000 stores and retail outlets amongst its membership. The Association has represented the interests of retailers and broader service sector for almost 100 years and aims to help Australian businesses grow.

This submission is made in relation to the Discussion Paper – Reducing Red Tape for Retail Shop Leases: Review of the Business Tenancies (Fair Dealings) Act issued in December 2015.

In reviewing the Discussion Paper section by section it becomes obvious that it has been prepared on the basis of just removing provisions in the Business Tenancies (Fair Dealings) Act without any understanding as to how the provisions were developed in the various jurisdictions throughout Australia to ensure that the culture in leasing premises was based on fairness and honesty and that any charges under the lease related only to that property.

The reviews that have taken place in all jurisdictions including the recent ones in Queensland and New South Wales were all aimed at reducing ambiguities reducing red tape. They all conceded that the existing legislation had created a good culture based on fairness and honesty and that many of the practices that the legislation had been successful but if removed the practices of old would most likely return.

The various stakeholders in those jurisdictions have produced a number of Codes relating to matters not included in their Acts or Regulations. One such code is the Casual Mall Leasing Code which has been very successful. In recent times The NRA and the Shopping Centre Council of Australia has been working on a Code of Practice for Turnover Over Figures and Statistics within shopping centres. The Code has been agreed in principle.

It is obvious that the proposed Retail Shop Lease Code of Practice has been prepared without prior consultation about the Code. The authors have failed to understand was to how many of the provisions with the Act came into being legislated. Much of what has been omitted from the Code were practices that were inequitable having a significant imbalance in power, practices which saw retailers charged for costs that were purely the landlord's cost of doing business and statements being made that had no substance to induce the tenant to take the lease.

If a Code is proposed it is essential that a working party of stakeholders be created and there needs to much more evidence given by government as to how Part 13 of the Consumer and Fair Trading Act would provide the same level of certainty that the current Act does.

Background

Nationally retail lease legislation was first introduced in the 1990s nationally when the then Code of Practice negotiated between the Building Owners and Managers Association and the various retail industry associations failed.

The Code was entered into on a voluntary basis and the reason for failure was for various owners and managers cherry picking those parts of the Code that they agreed with and ignoring those parts they disagreed with. Matters such as ratchet rents, key money, full disclosure of the outgoings that were to be recovered and recovering only outgoings that related to the demised property were but some of the matters that the landlord would not abide by in the lease and lease negations. In centres outgoing charges that were not paid by the major tenant were recovered from the speciality stores. In some instances owner's capital costs were also recovered for the tenant as was interest on borrowing.

Nationally legislation was introduced with most states adopting much the same covenants in their legislation with the Northern Territory being the last jurisdiction to introduce legislation. The object of the Act was to promote equity in the conduct of the lease negotiations, promote efficiency and provide a low cost dispute resolution process for retail tenancy disputes.

The legislation has seen many of the bad aspects of lease negotiation disappear largely as a result of the introduction of the disclosure statement which has seen that statements made by leasing agents are accurate. The legislation has also seen that the charges made under the lease, are charges that relate to that property and that the tenant pays only the share that relates to the leased premise.

In shopping centres retail tenants faced geographical restrictions in opening additional stores within a certain distance from the centre and were restricted from belonging to a tenant's association.

Regular reviews by all jurisdictions have been conducted and the amendments made were to improve the operation of the various Acts, clarify the intent of a provision and improve the dispute resolution procedures. The reviews have also had as an aim the harmonisation of the legislation between the various states and territories.

The following comments are a response to the points raised in the Discussion Paper.

4.3 Summary of the Protections to be retained in a Code of Practice

1. Section 3 – objectives of the Act

Retain objective (a): enhancing certainty and fairness in retail shop leasing.

The aim of all legislation as outlined in the background note has been to provide efficient, cost effective dispute resolution using initially mediation before reverting to the courts. Currently in the Northern Territory the initial mediation process has been avoided in all instances with the landlord seeking to have a certificate of failure issued and going straight to court. Nationally this is the only jurisdiction in which this is occurring and is not cost effective form a small tenant's viewpoint.

2. Section 5 – definitions

Retain relevant definitions. Revise the definition of "retail shopping centre" so that shops and premises of a like nature are captured.

The recent Queensland and the current NSW Review has had lengthy discussions in the stakeholders meetings and have come up with definitions that address all of the issues associated with this matter. What is the relevance of "premises of a like nature are captured"? If it is a shopping centres there are matters relating to such matters as outgoings share proportionately outgoing charges and if not paid the tenant the landlord must absorb the cost.

3. Sections 6-8 – exemptions

Agreed

4. Section 9 – Act overrides retail shop leases

Retain. In the original code in 1994 this was not included

5. Section 24 – key-money on grant of lease

Agree, retain.

6. Section 28 – rent review

Agreed, retain the current policy objectives (i.e. restriction on the frequency of rent reviews and restrictions on picking and choosing

methods depending on which method produces the highest increase in rent.)

7. Section 29-31 – review of current market rent

Retain the current guidance offered by section 29.

8. Sections 35-37 – sinking funds

Agreed retain the current governance requirements and scope of limitations of sinking funds

9. Section 54 – key-money on assignment

Agreed, retain the current provision

10. Section 61 – key-money for renewal or extension

Agreed, retain the current provision

11. Section 66 – confidentiality of turnover information

Agreed, retain the current provision. Following the recent Queensland Review, the Shopping Centre Council of Australia and the NRA have been in discussions developing a Code of Practice regarding the publication of turnover figures for tenants in an aggregated form to further enhance the imbalance in the information available to a tenant and a potential tenant in a retail shopping centre.

12. Section 73 – termination because of inadequate sales

Agreed, retain the current provision.

13. Part 10 (sections 76 to 81) – unconscionable conduct in connection with retail shop lease

Agreed, retain the prohibition on unconscionable conduct and subject matters in sections 79 and 80. These prohibitions have been responsible for a significant change in the culture of leasing and statements made to induce a tenant to enter into a lease.

14. Part 13 (sections 122 -134) business tenancies generally

Agreed to retaining section 133

15. Miscellaneous – franchise agreements

Agreed, how is the landlord to be joined to the franchise agreement when the contract is with the landlord and franchisor in most instances

16. Miscellaneous – removal of criminal offences

Agreed

4.4 Assessment of the Provisions of the Act

4.4.1 Section 3 – objects of the Act

Since the introduction of the legislation in the various jurisdictions with the aim of addressing the imbalance in the information and bargaining position of the tenant the objective was to achieve a change in the leasing culture with one based on accurate information from which the tenant could make an informed decision. This must be the basis of the negotiation.

The resolution of disputes relating to a dispute needed to be speedy and cost effective without resorting to expensive legal actions with the courts. The mediation process has worked very effectively in the other jurisdictions but in most instances has been bypassed in the Northern Territory. Courts in other jurisdictions have referred matters back to mediation where they are usually resolved.

This must be considered in the objects

4.4.2 Section 5: Definitions

In respect of Retail Shopping Centre much work has been done by the various stakeholders in the recent reviews in other jurisdictions to overcome a number of issues that have arisen in respect of mixed developments that have commercial towers attached to the retail shopping centre and in recent times where there have been residential apartments above the retail centre. If a Code is to be developed it is important for stakeholders to be consulted. They have spent hours resolving the issues of office towers in other jurisdictions.

There is concern about strata shops and the definition of a shopping centre. This usually arises where the body corporate undertakes work on common areas which has a significant impact upon the access to the retail shop and the tenant has no claim for compensation from the body corporate for disruption to the business.

The NRA has always seen the definition of as being for the sale or hire of goods by retail or the provision of retail services. The retail services cover such retail as hairdressers, beauty salons and nail bars, travel agents, and the likes. This definition has stood the test of time since 1994 and has only really been challenged by those who seek to avoid the legislation.

The list of retailers has worked in those jurisdiction that have adopted that approach but Victoria has opted just for the definition and contrary to the predictions of some lawyers there has been minimal cases that took the definition to VCAT. The NRA has only ever seen the Act applying to the retail shops and shops providing services by retail. The Association has always maintained that the Act should apply to all premises in retail shopping centres so that tenants pay only their share of outgoings. Retail tenants should not have loaded into outgoings, categories some tenants may not be paying and those outgoings should be borne by the landlord.

There may not be am imbalance in the bargaining power outside shopping centres but the behaviour of those leasing strip shops and making statements that often do not disclose all the matters relating to the lease such as zoning and planning issues, that somebody else will take the shop if they do not sign when there is no other party. As indicated earlier in this submission it is also about changing the behaviour of those leasing the premises.

4.4.3 Sections 6 – 8: Exemptions

The NRA has always seen the 1000 square metres of lettable area as the basis for the exclusion from the Act nationally. This is consistent with the other jurisdictions and for those national chains the harmonisation of the exemption is important.

The matters relating a listed corporation and the business associated with the landlord is also agreed.

The term from six months to 25 years is also agreed.

The matter relating to office towers has already been discussed earlier in this submission.

The government tenancies can be excluded from the Act but the government as a landlord cannot be excluded.

Airport leases on the landside of the terminal should not be excluded from the Act.

The NRA as agreed with the Queensland review has agreed to the definition of a major lessee.

4.4.4 Part 2 (section 12-16): Role of Commissioner of Business Tenancies (Office of Consumer Affairs)

The NRA agrees to the continuing role of the Commissioner of Business Tenancies and would urge that the role be extended to follow the similar roles in other jurisdictions in educating parties to a retail lease as to the Act or to the Code. The role should see early intervention in a dispute as evidence form the Eastern States has seen the majority of disputes being resolved even before mediation let alone action in a tribunal or a court. The role provides a circuit breaker in many disputes.

4.4.5 Part 3: Rights and duties before a retail lease is entered into

The NRA disagrees with these provisions not being maintained. There is a case for the disclosure being simplified for the strip shop. However the disclosure statement for the shopping centre is the one piece of legislation that has led to the change in many of the bad cultural aspects of retail leasing and the overcoming some of the imbalance of information between the landlord and the tenant.

The disclosure statement means that a proposed tenant full understands all charges within the lease and what the budget is going to be for outgoings in full details. The tenant is able to ensure the outgoings reflect the ratio of the shop lettable area to the total lettable area of the centre. The categories of the budget can be compared with the obligations within the lease and not be confronted with additional charges once the lease is signed.

The tenant is made aware as to the balance of the term of the lease of the major tenants which will have induced the proposed tenant to seek the lease. Given the structural changes that the industry has seen this knowledge is critical. Major tenants have been reducing the size of their tenancies or closing underperforming stores upon the expiry of the lease. This trend will continue.

Knowledge of matters such as category one works and what works will be provided by the landlord is essential for the tenant to make an informed decision when entering to the lease.

The disclosure statements are an integral to a tenant being given all the information needed to make an informed decision before entering into the lease.

4.4.6 Section 23: lease preparation costs

The NRA totally disagrees repealing this provision and the argument put forward for such repeal. The cost of lease preparation, mortgagee's consent and survey fees are the cost of the landlord doing business and should not be able to be recovered from the tenant. If repealed the Northern Territory would be the only jurisdiction in which such fees would be able to be recovered from the tenant. Commercially it is unfair to expect a landlord to be able to totally recover the cost of preparing the lease. Where does the recovery cost stop, do we the see the leasing agent's fee being sought to be recovered.

4.4.7 Section 24: key-money on grant of lease

If a Code is developed it is essential that this provision be maintained. Key-money has no place in the commercial negotiations for the lease of a property. Rent is the only commercial consideration in renting a premise, not some premium that the landlord wishes to offer to grant the lease.

4.4.8 Section 25: provision of signed/registered copies of leases

The lease is a contract which places rights and obligations upon the tenant. The tenant is entitled to be given a signed copy of the contract. The tenant must be able to read what those rights and obligations are so that he is able to fulfil the conditions of the lease. What other areas do not supply a written copy of the lease in commercial obligations.

The use of an the fact that an oral agreement is mentioned as a reason for not giving such a copy is totally and shows a lack of understanding as to why this has been included in all Acts in the various jurisdictions. It was to capture the leasing culture of an agent verbally agreeing to lease the premises, taking the rent and issuing keys to the premises to the tenant. The agent did not even have a lease prepared at that stage yet the tenant had paid consideration and taken possession so offer and consideration had been fulfilled.

A landlord should be required to provide such a copy within four weeks of the tenant giving the signed lease to the landlord. Should the tenant request the lease be registered to protect the tenant's equitable interest especially in the case of an option, the tenant should pay the cost of the registration and such registration should be done within 28 days of all parties to the lease signing the document.

4.4.9 Section 26: Minimum Five Year Term and certificates

The NRA recommends the repeal of this section and recommends that the term is subject to commercial negotiations.

4.4.10 Section 27: rent is not payable until fitout is completed

Tenants are often dependent upon the landlord undertaking certain works within the premise. The tenant has signed the lease and paid rent under the lease and may even have the keys to the premises. There are constantly within shopping centres where the landlord is still having the landlord's tradesmen undertaking work in the premises. This work includes the reticulation of the air conditioning and the fire sprinkler system which can only be done by those contractors.

There are cases where these works have delayed the tenant's fitout works by many weeks and often go well beyond the agreed fitout period before the tenant is to pay rent. This delay is totally the responsibility of the landlord and no fault of the tenant or the tenant's shop fitters.

Removal of this clearly demonstrates that the authors of the discussion paper have no understanding as to how some of the clauses within the Act came into being. The clause was inserted in as a penalty to the landlord for not being able to deliver the premise in a state that the tenant could undertake the fitout in the time agreed during the negotiations.

4.4.11 Section 28: Rent Reviews

The current provisions should be maintained. There should be only one method applied annually although the method may vary from year to year. Cherry picking the highest and best method of two or more methods to obtain the highest rent should be banned.

4.4.12 Section 29 to 31: review of current market rent

The current provisions should be retained as should sections 30 and 31. Again the authors of the discussion have failed to understand the reason for the insertion of these sections into the various Acts. They were not in the original Acts in any of the jurisdictions.

What happened many landlords, when they were faced with a falling rental market, would give no indication as to what the landlord deemed the market rent to be until after the tenant had exercised the option. This meant that the tenant was locked into the option, without being able to determine before exercising the option, what the market rent

would be. In the event that the market rent was unaffordable the tenant could vacate at the end of the lease.

Often the landlord would state an ambit claim that had little relevance to a realistic market rent.

These sections have seen a more equitable claim submitted by the vast majority of landlords when indicating a current market rent claim as a part of the claim.

4.4.13 Section 32: turnover rent

It has been agreed in all other jurisdictions that "online sales" are excluded from the definition of turnover in all Acts. Both the landlords and the tenant association realise there too many difficulties in defining online sales and when and where the sale actually takes place. Again the authors of the discussion paper fail to address how this provision came about and the practices that led to the insertion into the Act.

This is becoming a common theme throughout the discussion and is the result of the failure of the Department to consult with the stakeholders before attempting to create a code.

4.4.14 Section 33: special rent – cost of fitout

Again this provision needs to be retained. Prior to the introduction of the provision landlord failed to outline what category 1 works they would undertake for the premises and what was the indicative cost to make alterations to these works. This is especially the case with such items as sprinkler systems and air conditioning works.

4.4.15 Section 34: payments for unrelated works

Contrary to the arguments within the discussion paper, the car park is either a part of the shopping centre or it is not. Such land is able to be a part of the outgoing charges for recovery of rates and taxes and maintenance. Land that is purely held as a land bank for futures expansion is not considered as providing any benefit to the centre. This provision was to prevent landlord recovering from tenants of the shopping centre paying the landlord costs of land banking.

Again the discussion fails to understand how these provisions came into being.

The provision must be retained

4.4.16 Part 4, Division 2 (section 35-37): sinking funds

Agreed to retention.

4.4.17 Part 4, Division 3 (sections 38 to 42): Outgoings and expenditure statements

Again the Discussion Paper fails to understand the practices that have taken place in respect of the outgoings recovery process and the need to full disclosure of both budgets and audited expenditures to be made available to all tenants.

It is essential that tenants have a full understanding of what the charges are this provision has seen the majority of questionable practices that have taken place in the past disappear. Retention of the provisions is essential.

4.4.18 Section 43: Capital Costs – Environmental Upgrades

Again the authors of the Discussion Paper have shown total disregard to the previous practices that the introduction of the retail shop lease legislation sought to outlaw. Capital costs are a landlord's cost and have nothing to do with a retail lease. There is other legislation for the landlord to gain benefits for capital expenditure.

The NRA treats the Environmental Upgrade in the same manner as normal capital expenditure

4.4.19 Section 44: depreciation

The NRA disagrees with the repeal of this provision. The landlord does not have the right to double dip in gaining not only a tax advantage for depreciation but also full recovery from the tenant.

4.4.20 Section 55: contributions to interest

Again the Discussion Paper has sought to eliminate items without any consideration to as how they were placed in the legislation. Interest is a cost of doing business for the landlord as a part of the ownership of the property. It is interesting to note that landlords when dealing with tenants seeking assistance with their rent automatically eliminate any interest payments for a Profit and Loss statement on the basis that it is the tenant's cost of doing business.

The provision must be retained in any Code

4.4.21 Section 46: notice of alteration and refurbishment

The authors of the Discussion paper again have failed to understand as to how these provisions came to be in the legislation and the impact that lack of notice has on a tenant's business not to mention on the investment of a small business which in many cases exceeds $300,000. The NRA opposes the repeal.

4.4.22 Section 47: disturbance

This section is not questionable if the evidence over the years is taken into account. The further one goes into the Discussion Paper it is clearly evident that there is little or no understanding as to how these provisions came into being. It is also evident that no consideration has been given to any harmonisation with other jurisdictions especially for those national retailers who are integral to the industry and the economy.

The model to be used should be section 43 from the Queensland Act including the recent amendments

4.4.23 Section 48: relocation

4.4.24 Section 49: demolition

Both these provisions should be retained. The model provision to be used should be that of the Queensland Retail Shop Leases Act 1994 in Section 46 including the recent amendments 43 AD.

Section 46 combines both relocation and demolition provisions as well as compensation and was agreed by all stakeholders after ab exhausting review

4.4.25 Section 50: rent for damaged premises

Accepted, provided that the Law of Property Act applies.

4.4.26 Section 51: refurbishments and refittings

Evidence does not support the paper's position of the general law of contract. The clauses within the many retail leases specified refurbishments which ultimately were determined by the landlord to be almost a complete refit of the shop. Such clauses often did not have a time frame and were invoked once or twice within a five year period. In a five year lease the invoking of such a clause at the end of four years gave a tenant no time frame to amortise the cost.

4.4.27 Section 52: employment restrictions

This clause has been inserted to prevent the work practice of a landlord forcing the tenant only to use those contractors approved by the landlord.

4.4.28 Section 53: Assignment of Retail Shop Leases

This provision needs to be retained. Again on the evidence gained since 1994 when the legislation was first introduced the provision clearly defines the basis upon which a landlord my refuse an assignment. Repealing such a provision or not including it in a Code would see a return to the the practices that the provision sought to eliminate.

4.4.29 Section 54: key money on assignment prohibited

Agreed the provision needs to be retained

4.4.30 Section 55 to 57: Consent and information on assignment

Again the Discussion Paper assumes a position that did not take place in practice. There are often other parties associated in the sale of a business and a retail shop lease. The business broker seeling the business is only interested in getting the sale done and in many instances failed to advise the buyer on the process of assigning the lease. Often the facts concerning the business and the rent payable did not match the true trading position.

Landlords were often faced with discovering months later that the business had been sold. The landlord had little or no idea of the financial status of the buyer let alone the necessary experience to operate a retail business.

Many sellers who were the tenant were only interested in moving on and had no regard for what their obligations were under the lease.

The matters concerning guarantors have been resolved in all other jurisdictions. Lengthy discussions took place in the recent Queensland Review with all stakeholders agreeing on the position.

The NRA is for the maintaining of such a provision. It has reduced substantially many of the disputes relating to assignments.

4.4.32 Section 59: landlord's absolute discretion for certain consents

Again this clause was added to protect the landlord's right to deal with the landlord's property. Since the introduction of the Act tenants were faced with tenants wishing to mortgage their fit out to a third party and objecting to any refusal. Some tenants believed they had an unfetted right to sub divide the premises to any usage.

The provision made clear the landlord's right.

4.4.33 Section 60: obligations regarding extensions or termination of leases

The intention to repeal this section shows a lack of understanding as to how this provision came into the legislation.

The opportunity to lease a retail shop is limited by the planning legislation. Retail shops including both strip shops and shopping centres are strictly controlled in their location by the various local environmental plans. There are many considerations as to where to open a retail shop. These include such things as pedestrian flows, availability of car parking, the area demographics, the potential spend and convenience versus discretionary spend.

A retail tenant will look at all of these and other matters before entering into a lease. The cost of a fitout can be in the hundreds of thousands of dollars and stock on top of this cost. Stock at cost for a small specialty shop can be of the order of $50-100,000 depending on the volume of trade.

The retailer will work hard over the term of the lease to build up a successful business and develop a loyal customer base. Unlike other businesses such as lawyers, accountants and the like who are a destination and can operate from premises that are not prime street frontages or a shopping centre, the retailer is totally dependent upon location.

Before the legislation was introduced many landlords would advise the retailer at the end of the lease they had one month's notice to vacate the premises. It was impossible for the retailer to relocate their business in that period of time with the result that many successful businesses were unable to carry on. Often the retailer was left with stock, redundant fittings and expenses with no source of income.

The notice period of not renewing the lease was to enable the retailer to undertake an orderly transition to a new premise or to liquidate the business without a fire sale.

4.4.34 Section 61: key money for renewal or extension of lease

Agreed to the retention of the provision

4.4.35 Section 62: trading hours

Agreed

4.4.36 Section 63: security bonds

The NRA disagrees that the matter of security deposits is questionable. Again as with previous matters experience has shown that security deposits especially when cash is involved has seen the deposits disappear or be misused by the landlord. When properties have been sold the security deposit has been taken by the seller. The tenant should not have to revert to the common law to have returned what is rightfully the tenant's money especially at the end of a lease. The money was given in trust and should be treated as such.

4.4.37 Section 64: compulsion regarding conveyancing, legal and accountancy services

If the matter of the term of the lease is removed, the issuing of a certificate in respect of the minimum term is not required.

With regard to the provision that a tenant cannot be compelled to use the legal practitioner of the landlord, this was inserted to prevent again the practice especially of leasing agents letting strip shops that the tenant use the landlord's solicitor to speed up the process.

Given that the value of retail shop leases can exceed $500,000 over a three year term, it is prudent that a tenant seek the advice from a legal practitioner that is independent. What is the difference between a lease and a mortgage in respect of obtaining advice?

4.4.38 Section 66: disclosure of turnover figures

4.4.39 Section67: disclosure of statistical information

The Shopping Centre Council of Australia in conjunction with the NRA following the Queensland review has developed a Code of Practice for

the disclosure of turnover figures and statistical information for shopping centres. Both parties are awaiting the agreement of other parties so that the Code can be proceeded with. It will provide a much more informed tenant within a centre or proposing to lease a premise within a centre.

This Code will go a long way to correcting the perceived imbalance in the information when negotiating a lease.

4.4.40 Section 68: advertising of tenant's business

The NRA would need to be convinced that such a provision would fall within the scope of unconscionable conduct under Section 79 (2) (b). Decisions relating to unconscionable conduct in other jurisdictions would not agree with such a statement. There is a much higher barrier as to what is unconscionable. Again there is no certainty that would be picked up in the extension of unfair contract term protections to small business.

4.4.41 Section 69-72: advertising and promotion expenses

There is implied in all the lease negotiations that the marketing and promotion fund collected within a lease is that it will be applied to the promotion and marketing of the centre. Any statement to the contrary would mean that all of the statements made during lease negotiations are false and misleading to the tenant.

The Shopping Centre Council of Australia in other jurisdictions that the funds belong to the centre for that purpose and that the landlord in most instances will also contribute.

Further it has been agreed that the landlord is the administrator of the funds. There have been instances when the centre was sold that the landlord attempted to keep the funds and not have it spent on the centre.

There is agreement amongst the stakeholders that the marketing plan, budget and audited report may be available to the tenant. Good landlord practice would clearly see all retailers be made aware of the marketing plan.

4.4.42 Section 43: termination because of inadequate sales

4.4.43 Section 43: prohibiting tenant's businesses elsewhere

Agreed

4.4.44 Section 75: changes to core hours

The provision should be maintained so that those who have entered into a lease on the basis of the core trading hours of the centre cannot be unilaterally by the landlord. If there is consensus amongst the tenants then the core hours can be changed

4.4.45 Part 10 (sections 76 to 81) –unconscionable conduct with retail shop lease

Agreed to be retained

4.4.46 Parts 11 and 12: Dispute resolution for retail tenancy claims and appeals

The Northern Territory is the only jurisdiction in which the litigation process is the first course of action often trying to conciliate before the hearing. In the other jurisdictions where the Commissioner takes a more hands on role in establishing the basis of the dispute, many are resolved at this stage.

Further if the parties enter into the alternate dispute procedure in good faith ad actually focus on the basis of the dispute the majority are resolved at this point with far less legal costs and an equitable outcome.

The majority of jurisdictions all want the alternative process to be explored to free up court resources. If the Local Court adheres to the pre-trial conciliation this could be a solution. However consideration must be given that the majority of disputes would exceed the $10,000 threshold. What would be the procedure for these actions, especially if relief of forfeiture was required?

4.4.47 Part 131 (sections 122 to 134): Business tenancies generally

Section 133 relating to the rights of association should be maintained.

4.4.48 Miscellaneous – franchisee arrangements

Agreed

4.4.49 Miscellaneous – removal of criminal offences

Agreed

4.4.50 Miscellaneous – Gross leases

This is not covered in the Discussion Paper but if regulations are to be reduced the adoption that the rental charge in a retail shop lease should include all costs associated with rent, outgoings and promotion and marketing funds.

Such a provision would do away with all budgets, expenditure reports for outgoings and the promotion and marketing funds. It would see a significant reduction in any disclosure statements.

The landlord would not be disadvantaged by this provision and would in fact see a cost reduction in their administration costs.

5. Retail Shop Lease Code of Practice

Before any consideration is given to the introduction of a Code of Practice a working party should be established with the stakeholders to ensure that all matters are fully understood.

It is noted that no reference to dispute resolution procedures nor to a committee responsible for the overseeing such code.

THREE OFFICES NATIONWIDE

1800 RETAIL

QUEENSLAND HEAD OFFICE

6 Overend Street
East Brisbane QLD 4169

PO Box 1544
Coorparoo QLD 4151

VICTORIA

Junction Business Centre
Suite G02 22 St Kilda Road
St Kilda VIC 3182

NEW SOUTH WALES

PO Box Q522
QVB Sydney NSW 1230